

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ORLANDO ELLISON,

Plaintiff,

No. CIV S-03-1391 FCD JFM P

vs.

DR. NADIM KHOURY, et al.,

Defendants.

ORDER AND

FINDINGS AND RECOMMENDATIONS

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Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights action pursuant to 42 U.S.C. § 1983. This matter is before the court on defendant Dr. Bhagavan's motion to set aside the clerk's entry of default and on plaintiff's motion for default judgment.¹

By order filed April 22, 2004, this court ordered the United States Marshal to notify defendant Bhagavan of the commencement of this action and to request a waiver of service from said defendant.² A waiver of service, signed by defendant Bhagavan on June 14, 2004, was

¹ Summary judgment has been granted for the other three defendants in this action. See Order filed March 30, 2005.

² Defendant Bhagavan has been identified as "Dr. Bhagavon" in several orders of this court. The court will henceforth use the correct spelling of defendant Bhagavan's name as it appears in his motion to set aside entry of default.

1 filed in this action on June 30, 2004. The signed waiver of service reflects a change of defendant
2 Bhagavan's address to Bangalore, India. The waiver indicated that a response to the complaint
3 was due sixty or ninety days from April 29, 2004, depending on where the request for waiver of
4 service was sent. Both periods elapsed without a responsive pleading from defendant Bhagavan
5 and on February 2, 2005, this court directed the Clerk of the Court to enter defendant Bhagavan's
6 default.

7 By order filed February 17, 2005, plaintiff was granted a period of twenty days in
8 which to seek appropriate relief against defendant Bhagavan. On February 23, 2005, defendant
9 Bhagavan filed the instant motion to set aside entry of default. Plaintiff filed a motion for default
10 judgment on March 10, 2005.

11 Rule 55(c) provides that a court may set aside a default for
12 "good cause shown." The "good cause" standard that governs
13 vacating an entry of default under Rule 55(c) is the same standard
14 that governs vacating a default judgment under Rule 60(b). See
15 TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 696 (9th
16 Cir.2001). The good cause analysis considers three factors:
(1) whether [defendant] engaged in culpable conduct that led to the
default; (2) whether [defendant] had a meritorious defense; or (3)
whether reopening the default judgment would prejudice
[plaintiff]. See id.

17 Franchise Holding II, LLC v. Huntington Restaurants Group, Inc., 375 F.3d 922, 296 (9th Cir.
18 2004).

19 The record reflects no culpable conduct by defendant Bhagavan leading to entry of
20 default. Defendant Bhagavan has submitted evidence that following receipt of the summons,
21 complaint, and request for waiver of service he sent an e:mail to his employer, the National
22 Medical Registry, to inquire about the status of the case and was told that the company's
23 insurance carrier was taking care of the matter. (See Declaration of N.K. Bhagavan, M.D., filed
24 February 23, 2005.) Defendant has also submitted evidence that the insurance company's claims
25 superintendent assigned to the matter mistakenly thought that the only defendant in this case
26 covered by the insurer was Dr. Nadim Khoury, and that this mistake controlled inquiries from the

1 insurance carrier about the case until February 2005, when defendant Bhagavan's default was
2 entered. (See Declaration of Robert L. Johnston, filed February 23, 2005.) Defendant Bhagavan
3 has also presented evidence of a potentially meritorious defense to plaintiff's claims. (See
4 Bhagavan Declaration.) Moreover, the record reflects no cognizable prejudice to plaintiff from
5 setting aside the entry of default.

6 For all of the foregoing reasons, defendant Bhagavan's motion to set aside entry
7 of default should be granted. Since the entry of default should be set aside, plaintiff's motion for
8 default judgment should be denied.

9 In accordance with the above, IT IS HEREBY ORDERED that the Clerk of the
10 Court is directed to serve on defendant Bhagavan a copy of the discovery order filed in this
11 action on November 24, 2003; and

12 IT IS HEREBY RECOMMENDED that

13 1. Defendant Bhagavan's February 23, 2005 motion to set aside entry of default
14 be granted;

15 2. The Clerk of the Court be directed to set aside the default entered against
16 defendant Bhagavan;

17 3. Defendant Bhagavan be directed to respond to the complaint within ten days
18 from the date of any order by the district court adopting these findings and recommendations; and

19 4. Plaintiff's March 16, 2005 and May 10, 2005 motions for default judgment be
20 denied.

21 These findings and recommendations are submitted to the United States District
22 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
23 days after being served with these findings and recommendations, any party may file written
24 objections with the court and serve a copy on all parties. Such a document should be captioned
25 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
26 shall be served and filed within ten days after service of the objections. The parties are advised

1 that failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: December 20, 2005.

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6 UNITED STATES MAGISTRATE JUDGE

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